ABDULLAH AZIZI ABD HAMID

v.

MENTERI SUMBER MANUSIA & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[ORIGINATING SUMMONS NO: R1-25-121-96]
23 DECEMBER 1997

ADMINISTRATIVE LAW: *Judicial review - Refusal of Minister to refer labour dispute to Industrial Court - Whether unreasonable - Test to be applied*

ADMINISTRATIVE LAW: *Judicial review - Function of court in judicial review - Whether hearing by way of appeal - Principles applicable - Whether court can consider evidence not available in inferior tribunal*

The applicant was employed by the 2nd defendant, Magnum Corp Bhd, as a driver from 16 October 1993 until 6 April 1994, when his services were terminated with immediate effect by providing him with four weeks' salary in lieu of notice. The grounds for termination were generally his unsatisfactory performance of duties in the form of absenteeism without reasonable excuse.

The applicant made representations to the Director-General of Industrial Relations ('the DG') under s. 20(1) of the Industrial Relations Act 1967 ('the Act') for reinstatement on the ground that he had been dismissed without just cause or excuse. Following a failed conciliation meeting, the matter was referred to the 1st respondent ('the Minister'), who was of the view that the applicant's representations were not fit to be referred to the Industrial Court.

In this application, the applicant applied for an order of *certiorari* to quash the Minister's decision and for an order of *mandamus* to direct the Minister to refer his representations to the Industrial Court.

Held:

[1] Firstly, in an application under s. 20(3) of the Act, it is not the Minister's function to decide on the triable issues. The Minister exercises his discretion whether or not to refer a representation to the Industrial Court based on the evidence and the report of the DG setting out what took place at the conciliation proceedings. As such, any evidence not before the DG in the conciliation proceedings must be ignored by the court of judicial review in deciding whether the Minister has exercised his discretion properly.

[2] Secondly, a court of judicial review is not a court hearing appeals from the Minister's decisions under s. 20(3) of the Act. The Minister's decision must not be interfered with unless he has misdirected himself in law or has taken into account irrelevant matters or failed to take into account relevant matters or his decision millitated against the object of the statute.

[3] Some of the documentary evidence before the court were not mentioned in the Minister's affidavit in reply and the applicant had not adduced evidence to show that the documents were before the DG during the conciliation proceedings. In the circumstances, it could not be assumed that they were before the Minister when he made his decision and as such, could not be considered by the court.

[4] Having considered all the matters presented in the proceedings, it could not be said that the Minister had acted unreasonably by not referring the representations to the Industrial Court. Unreasonableness must be such that no reasonable person simularly circumstanced would have arrived at such a decision. The Minister was correct in refusing to refer the applicant's representations to the Industrial Court.

[Application dismissed with costs to the first respondent; no order made in favour of the second respondent.]

Cases referred to:

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 ***(foll)***

Minister of Labour, Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103 ***(foll)***

National Union of Hotel, Bar & Restaurant Workers v. Minister of Labour & Manpower [1980] 2 MLJ 189 ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1), (2), (3)
Rules of the High Court 1980, O. 53 r. 1(2)

For the applicant - Anand Ponnudurai; M/s Gurbakhash, Tan & Ezura
For the respondent - Alice Loke Yee Ching

Reported by Anne Khoo

JUDGMENT

Abdul Kadir Sulaiman J:

The applicant was employed by the second respondent on 16 October 1993 as its pool driver for Dato' Richard K. Lau or any other persons whenever authorised, with a monthly salary of RM650. By a letter dated 6 April 1994 his services were terminated with immediate effect by providing him with four weeks salary in lieu of notice. The reason for the termination as stated in the said letter was:

> As you know, we have spoken to you on a number of occasions about your unsatisfactory performance as a Driver for failing to report for work on several occasions without reasonable excuse or prior permission obtained from the Company.
>
> Despite our warnings, you have persistently absent yourself from work. We therefore find you unsuitable for continued employment with our Company.

Consequently, on 12 April 1994 the applicant made representations in writing to the Director General under s. 20(1) of the Industrial Relations Act 1967 for reinstatement having considered himself to have been dismissed without just cause or excuse. Following that, on 28 June 1994, he attended a conciliation meeting with the second respondent at the office of the Director General. This is for the purpose provided for by s. 20(2) of the Act. Then by a letter dated 21 September 1996 he was informed by the first respondent pursuant to s. 20(3) of the Act that his representations were not fit to be referred to the Industrial Court.

The applicant was not happy with the said decision of the first respondent and pursuant to leave granted, on 23 March 1997 he filed an application for an order of *certiorari* to quash the said decision of the first respondent and also for an order of *mandamus* to direct the first respondent to so refer his representations to the Industrial Court for an award. In support of his application is an affidavit affirmed on 1 November 1996 and a statement pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980 ('the RHC'). In his affidavit in support, the applicant deposed that the termination letter was given to him without prior inquiry being held and without prior notice. It was also deposed that throughout his service, the second respondent, never gave him any warning be it written or oral on the allegations made. On the other hand he worked hard and never failed to report for duty. As proof of the facts deposed, he exhibited his statement of salary and overtime sheets. Hence, his dismissal was without just cause and is in contravention of the principle of natural justice. Under the circumstances, he contends that the first respondent has erred in law in not referring his representations to the Industrial Court.

In reply, the first respondent filed an affidavit affirmed on 21 July 1997 in defence of his action not to refer. According to the first respondent, having seriously considered all the information relating to the representations of the applicant he was satisfied that the said representations were frivolous and vexatious and therefore, not a fit case for reference to the Industrial Court under s. 20(3) of the Act. In considering the representations he took into account all the information relating to the representations including those various exhibits tendered by the application in his present application before this court. The first respondent deposed further that the applicant was told orally on several occasions by the second respondent over his irresponsible attitude of not reporting for work to his office and of not having reasonable excuse for not coming to work. He gave specific dates of such happenings and also specific dates when the applicant actually did report for work. He also deposed that the applicant was given advice and counseling by specific officers of the second respondent to change his irresponsible attitude. Finally he disputed the various allegations made by the applicant over his exercise of discretion under s. 20(3) of the Act and deposed that his decision not to refer the representations of the applicant to the Industrial Court is not perverse but with reasonable justification.

To that affidavit of the first respondent, the applicant filed an affidavit in reply on 10 October 1997 to challenge the evidence of the first respondent by introducing evidence to displace it. He introduced evidence of his having been paid for overtime work on some of those dates and in one instant he was on one day approved leave. He denied the evidence of him ever been given any advice or counseling as alleged. He also deposed that in accordance with the terms and conditions of service with the second respondent, no disciplinary action has ever been taken against him.

It is settled law that it is within the discretion of the first respondent under s. 20(3) of the Act not to refer representations of a dismissed workman to the Industrial Court for an award if such representations are frivolous or vexatious in nature. However, if in the course of the exercise of his discretion, having before him facts and material placed by the Director General in his notification under s. 20(2) of the Act, there is a triable issue raised in the matter, it is his duty to refer such representations to the Industrial Court for adjudication, as the representations is no longer frivolous or vexatious. It is not his function to decide on the triable issue raised for that function of the Industrial Court. His decision one way or another is subject to scrutiny in a proceeding for judicial review. In *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481 CA, Gopal Sri Ram JCA said at p. 513 as follows:

Put simply, the first question which the Minister ought to ask himself is whether the way in which he proposes to exercise his discretion will have the effect of preventing or settling the particular dispute; for that is what the Act is primarily aimed at. However, as I have explained just a moment ago, this approach to the exercise of discretion is only a very general guide because a rigid adherence to it may result in every case being referred to the Industrial Court. This is certainly not what Parliament intended is manifested by its conferment upon the Minister of a discretion whether to refer, or not to refer, a representation to the Industrial Court.

The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s. 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case. But there are some pretty obvious cases where a reference may be properly denied.

Take the case of a workman who had admitted the commission of serious misconduct such as an assault upon his employer or a fellow employee, or to theft of his employer's property; or where, for example, the employer, after dismissing the workman, repents and reinstates, or offers to reinstate him in his former employment without loss of any benefits or privileges. In all these examples, the Minister may well be within the purview of the section in declining a reference. In the last example, there is simply nothing to refer because of the reinstatement or the offer thereof. If in such a case, the Minister does decide to refer, then, the exercise of his discretion may be quashed in *certiorari* proceedings as being obviously unreasonable. Reinstatement is the primary remedy in industrial law, and an acceptance of it or an unreasonable rejection of it by the workman must be treated as having put an end to the dispute.

I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under s. 20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings. A court may, upon an objective assessment of **the facts and material that was placed before the Minister,** fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award. (Emphasis added).

The function of the court in a judicial review of the exercise of the powers by the Minister under s. 20(3) of the Act is not a function of an ordinary court to hear and decide disputed facts as contained in the various affidavits filed in the proceedings for judicial review. For those disputed facts may not well be before the Minister when performing his function under s. 20(3) in deciding whether or not to refer the representations to the Industrial Court. Those disputed facts ought to have been placed before the Director General went he met both the parties for the purpose of s. 20(2) of the Act. But if

that was not done, it will be too late in the day to present it before the court in judicial review proceedings to review the decision of the Minister because those matters would naturally not be before the Minister when he made the decision. By the scheme of s. 20 of the Act, the Minister when making a decision under sub-s. (3) does not sit to hear evidence from the parties in dispute. He relies purely on the notification made to him by the Director General under sub-s. (2) after the latter had failed in his attempt to settle the dispute by conciliation. With the notification he would have before him naturally the report of the Director General of what took place during the conciliation proceedings including whatever evidence both oral and documentary presented therein. Upon all these matters placed before him, the Minister would make a study and decide as to whether the representation is frivolous or vexatious. He is not allowed to consider other irrelevant matters not placed before him by the Director General. That being the case, what took place before the Director General during the conciliation proceedings is crucial. If any evidence now placed before the court of judicial review was not before the Director General, that evidence must be ignored by the court in deciding whether the Minister has or has not properly exercised his discretion under s. 20(3) of the Act.

Secondly, this court of judicial review is not a court hearing appeals from the decision of the Minister made under s. 20(3) of the Act. In *Minister of Labour, Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 Hashim Yeop A Sani CJ (Malaya), delivering the judgment of the Supreme Court has this to say at p. 12:

> The minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had mis-directed himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

Having that in the forefront of my mind, I will now deal with this application of the applicant concerning the decision of the first respondent made on 21 September 1996 not to refer his representations to the Industrial Court. The first respondent gives his reasons for not referring the representations of the applicant to the Industrial Court by his affidavit in reply of 21 July 1997. At para. 5 of the said affidavit he deposed that at the time he made the decision he took into consideration all information concerning the representations including exhs. "AA1" and "AA4" exhibited in the affidavit in support of the

applicant. Exhibit "AA1" is at pp. 1 to 3 which comprised of the appointment letter dated 18 October 1993 from the second respondent to the applicant as a pool driver, and the job description. Exhibit "AA4" at pp. 6 and 7 is the letter from the second respondent to the applicant dated 6 April 1994 terminating his employment with immediate effect with four weeks salary in lieu. The reason for the termination is given in that letter as quoted earlier in this judgment. Therefore from the series of exhibits contained in the affidavit, the first respondent made no mention of exhs. "AA2", "AA3" and "AA5". Exhibit "AA2" is a letter of confirmation of the applicant in the job after serving the probationary period with the second respondent. Exhibit "AA3" is a letter dated 4 January 1994 providing bonus to the applicant for the year 1993. Exhibit "AA5" is made up of the salary sheets of the applicant for period 31 October 1993, 30 November 1993, 24 December 1993, 31 December 1993, 31 March 1994, 30 April 1994 and 31 May 1994, and overtime sheet for October and November 1993, and January to March 1994. There was no evidence from the applicant that those exhibits not mentioned by the first respondent was before him when he made the impugned decision on 21 September 1996 or for that matter were before the Director General during the conciliation proceedings. In the circumstances, it cannot be assumed that they were before the first respondent when he made the decision. If that be it, this court cannot consider whatever contained therein to impugn the decision of the first respondent. In paras. 7.1 and 7.2 of the said affidavit of the first respondent, he deposed as follows:

> 7.1. Merujuk kepada perenggan 4.1, 4.2, 4.3 dan 4.4, saya menyatakan bahawa Pemohon telah diberitahu beberapa kali secara lisan oleh Responden Kedua mengenai sikap tidak bertanggungjawab Pemohon yang tidak melaporkan diri ke pejabat dan tidak bertugas tanpa sebab yang munasabah. Tarikh-tarikh tersebut adalah 11.1.1994 hingga 29.1.1994, 21.2.1994 hingga 24.2.1994 dan pada 1.3.1994 hingga 31.3.1994. Pemohon telah hanya melaporkan diri untuk bekerja pada 8.3.1994 hingga 12.3.1994, 26.3.1994 hingga 28.3.1994 dan 30.3.1994.
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> 7.2 Pemohon juga telah diberi nasihat serta kounseling oleh Pegawai Perjawatan, Kerani Pentadbiran dan Setiausaha kepada Dato Richard K. Lau supaya mengubah sikap tidak bertanggungjawabnya.

Further in his affidavit, the first respondent deposed that he had taken into consideration all the relevant information given by the applicant and the second respondent and was satisfied that the applicant's representation is not fit to be referred to the Industrial Court. In the exercise of his discretion under s. 20(3) he acted *bona fide* in accordance with the object of the statute so as to come to a just and equitable decision and his decision not to refer the

representations of the applicant to the Industrial Court is not perverse but with reasonable justification. The question is where does he get all those information to enable him to come to the decision. Surely from the notification he received from the Director General under s. 20(2) of the Act. But for the notification, he would not be able to list out all those dates mentioned in para. 7.1 of the affidavit. There was no suggestion in the various affidavits of the applicant that the Director General did not properly present the facts to the first respondent. In any event all the overtime sheets exhibited by the applicant in this present proceedings are self serving as they had not been verified by anyone.

Learned counsel for the applicant submitted that the first respondent in the making of the decision had acted unreasonably within the **Wednesbury's** principle. This so because on 4 January 1994 as in exh. "AA3" the applicant was paid bonus which goes to show that the second respondent was satisfied with his performance. Therefore, it would be impossible for the performance of the applicant soon after to be so bad as to justify his dismissal. The answer to that is the conduct of a man can change overnight for his own reason. The bonus payment which the applicant got was in respect of his work performance in 1993 ie, from 16 October 1993 when he joined the service. Apart from the bonus, from 16 January 1994 he was confirmed in his appointment. But from the evidence available to the first respondent from 11 January 1994 onwards his performance deteriorated. Fed with the information as contained in his said paras. 7.1 and 7.2 of his affidavit in reply, the first respondent cannot be said to have acted so unreasonably as not to refer the representations to the Industrial Court. Unreasonableness here must be one that no reasonable person similarly circumstanced would have arrived at such a decision. As stated earlier on in this judgment, the function of this court in this nature of proceeding is not to treat itself as a court of first instant hearing the disputed facts presented before it or as a court of appeal against the impugned decision of the Minister. To reiterate, I would like to quote a passage from the judgment of Raja Azlan Shah CJ (Malaya) as His Highness then was when delivering the judgment of the then Federal Court in *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* [1980] 2 MLJ 189. At p. 190 his Lordship said:

> This subjective formulation is sufficient in our opinion to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action within the scope of the discretionary power. It is the exercise by him of the discretion vested in him, not in the courts, that we are here required to review, and when his action is challenged in the courts for alleged abuse of discretion, we are obliged to resist any temptation to convert our jurisdiction to review into a reconsideration of the merits as if on appeal.

Then towards the end of the judgment at p. 191 his Lordship continued:

> As we had said earlier in this judgment, we must guard against any tendency to equate the distinct process of mere review with an unarticulated opinion that having investigated the facts we are in a better position to adjudicate upon the merits. That is not our function. It is not for us to say what shall or shall not be done in this special area of delegated jurisdiction. Our duty is only to see that the matter in hand has been determined by the Minister in accordance with the policy and object of the Act. That in our opinion he has don.

In a similar note, in this present application of the applicant, for the reasons stated earlier, having considered all the matters presented before me in this proceedings, I am satisfied that the first respondent was right in the exercise of the discretion given him by s. 20(3) of the Act in refusing to refer the representations of the applicant to the Industrial Court, for they being of a kind which is frivolous and vexatious. In the circumstances, the application is dismissed with costs to the first respondent. No order is made in favour of the second respondent as they did not take any part in this proceedings even though served with the process.